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No. 85-1297.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

ISAAC MANEGO,
PETITIONER-APPELLANT,

v.

THE ORLEANS BOARD OF TRADE,
CAPE COD FIVE CENTS SAVINGS BANK,
AND DAVID B. WILLARD,
RESPONDENTS-APPELLEES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition of Respondents Cape Cod Five Cents Savings Bank and David B. Willard.

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Questions Presented.

1. Whether certiorari should be granted to review a decision that Petitioner's antitrust claim was barred by *res judicata* because it arose from the same set of transactions as an earlier claim that had been decided in federal court.

2. Whether certiorari should be granted to review a dismissal of Petitioner's antitrust claim, when that dismissal can be sustained on the alternate ground that the *Noerr-Pennington* doctrine bars the claim.

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Brief in Opposition of Respondents Cape Cod Five Cents Savings Bank and David B. Willard.

Respondents Cape Cod Five Cents Savings Bank and David B. Willard respectfully request that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 773 F.2d 1.

Statement of the Case.

This is the third action brought by Petitioner Isaac Manego in response to his failure to obtain licenses needed to operate a discotheque which he proposed to build in the Town of Orleans, Massachusetts.

The factual background of this action has been reviewed in the decisions below. *Manego* v. *Orleans Board of Trade*, 773 F.2d 1, 2-4 (1st Cir. 1985). Petitioner claims that Respondents Cape Cod Five Cents Savings Bank (the "Bank"), David B. Willard ("Willard"), a bank vice president, and the Orleans Board of Trade conspired in early 1979 to prevent his opening a discotheque in Orleans, in order to prevent competition to an ice skating rink, known as the Lower Cape Sports Arena (the "Rink"). The land on which Petitioner planned to build his disco is located a few hundred feet from the Rink. Through foreclosure proceedings, the Bank owned the Rink from 1978 until mid-1979. The Rink was principally used by children for hockey and figure skating.

In late 1978 and early 1979, Petitioner submitted applications to the Orleans Board of Selectmen for a liquor license and an entertainment license for his proposed disco. Willard, who in 1979 was also president of the Orleans Board of Trade, a private organization which functions as the local chamber of commerce, raised the issue of the proposed disco at the Board of Trade's regular January 1979 meeting. After a discussion, a majority of the Board of Trade members in attendance voted to register their opposition to the disco.

In January 1979, the town Selectmen conducted a public hearing on Petitioner's license applications. Over 100 persons attended that hearing and many voiced concerns about traffic, noise, and the effect of a nearby establishment serving liquor on the children using the Rink. A petition containing 369 signatures was also submitted to the Selectmen in opposition

to the disco. Willard attended the January 1979 public hearing held by the Selectmen and reported the vote earlier that month by the Board of Trade in opposition to the disco. After conducting a second hearing in early February 1979 and receiving a study predicting the traffic impact of the proposed discotheque, the Selectmen voted to deny Petitioner's license applications.

Notwithstanding the denial of the licenses earlier that year, in May 1979 the Orleans Board of Appeals granted Petitioner a building permit. The Bank filed a law suit challenging the issuance of this permit in Barnstable Superior Court on June 1979, but then withdrew its suit two months later when it sold the Rink to Paul Thibert ("Thibert"), who had been the Rink's manager.

Following the denial of the licenses he sought, Petitioner filed suit in Barnstable Superior Court seeking a writ of mandamus to compel the Selectmen to issue an entertainment license to him. *Manego* v. *Board of Selectmen*, Civil Action No. 38824 ("*Manego I*"). The Superior Court granted the defendants' motion to dismiss and Petitioner did not appeal.

Petitioner then filed a second lawsuit in the United States District Court for the District of Massachusetts against the Bank, Willard, another bank officer and the Orleans Board of Selectmen. *Manego* v. *Cape Cod Five Cents Savings Bank, et al.*, Civil Action No. 80-1406-MC (D. Mass.) ("*Manego II*"). In that action, Petitioner claimed that the defendants had conspired to violate his civil rights under a number of federal statutes, including 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, and 1988. The District Court granted Willard and the Bank's motion to dismiss or for summary judgment. *Manego II*, (D. Mass. April 13, 1982). That dismissal was affirmed by the First Circuit Court of Appeals. *Manego II*, 692 F.2d 174 (1st Cir. 1982).

Petitioner then filed the present action against the Bank and Willard, as well as against the Orleans Board of Trade and its members. *Manego* v. *Orleans Board of Trade, et al.*, Civil

Action No. 83-0045-C (D. Mass.) ("*Manego III*"). In *Manego III*, Petitioner alleged that the defendants had engaged in a conspiracy in violation of federal antitrust laws.

As the District Court in *Manego III* stated, the allegations in the *Manego III* complaint were "based on and address[ed] the same events that were the subject of both the earlier cases." *Manego III*, 598 F.Supp. 231, 233 (D. Mass. 1984), *aff'd*, 773 F.2d 1 (1st Cir. 1985). In both complaints, Petitioner's claimed injuries arose from the denial of his license applications by the Orleans Selectmen. *Compare Manego III, supra*, 773 F.2d at 2, *with Manego II, supra*, 692 F.2d at 175. In both *Manego III* and *Manego II*, Petitioner based his conspiracy allegations on the fact that two Selectmen, who were also members of the Orleans Board of Trade, may have voted at the January 1979 Board of Trade meeting in opposition to Petitioner's license applications, before the Selectmen took their official vote on the question. *Compare Manego III, supra*, 773 F.2d at 4, *with Manego II, supra*, 692 F.2d at 176 and n.3.

In both *Manego II* and *Manego III*, Petitioner based his conspiracy claims concerning the Bank and Willard on the same conduct. In his *Manego III* antitrust conspiracy action Petitioner complained that the Bank, through Willard, influenced the Orleans Board of Trade and the Selectmen to reject Petitioner's license applications. *Manego III, supra*, 773 F.2d at 4, 6 n.2. Petitioner made the same allegation in his earlier civil rights conspiracy action. *Manego II, supra*, 692 F.2d at 175. In both actions, Petitioner also claimed that the Bank sought to block construction of his discotheque, first by intimidating building suppliers, *compare Manego III, supra*, 773 F.2d at 7, *with Manego II, supra*, 692 F.2d at 175, and then by filing a lawsuit to enjoin the issuance of a building permit to him for the disco, *compare Manego III, supra*, 773 F.2d at 4 with *Manego II, supra*, 692 F.2d at 175.

In fact, the only significant differences between the *Manego II* and *Manego III* complaints were Petitioner's change in legal theory, the addition of the Orleans Board of Trade and the deletion of the Orleans Board of Selectmen as defendants in *Manego III*, and the addition in *Manego III* of new facts about the use of the Rink subsequent to the issuance of an entertainment license to it in July 1979 (after its sale by the Bank to Thibert). But, as the Court of Appeals noted, "the conduct alleged [in both complaints] is precisely the same, i.e. the actions of the Bank and Willard vis-a-vis the proposed disco." *Manego III, supra,* 773 F.2d at 7.

Willard and the Bank moved for summary judgment on the ground that the *Manego III* complaint was barred by *res judicata* and, in the alternative, that the activities complained of were protected by the First Amendment under the *Noerr-Pennington* doctrine, as stated in *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The District Court granted defendants' motions for summary judgment, finding that, as to the Bank and Willard, the *Manego III* complaint was barred by *res judicata*, and, as to the Orleans Board of Trade, the activties alleged by the Petitioner were protected under the *Noerr-Pennington* doctrine. *Manego III, supra,* 598 F.Supp. 231. That decision was affirmed by the First Circuit Court of Appeals. *Manego III, supra,* 773 F.2d 1.

Reasons Why the Writ Should Be Denied.

I. Certiorari Should Be Denied Because the Decision Below Correctly Applied Settled Principles of Law to the Particular Facts of This Case.

In the decision below, the First Circuit Court of Appeals formally joined the growing number of federal and state courts which have used the analysis set forth in the Restatement (Second) of Judgments, § 24 (1982) for determining whether a claim is barred by *res judicata*. *Manego III*, *supra*, 773 F.2d at 5. The Restatement test is whether the claims arose from the same "transaction, or series of connected transactions." Restatement (Second) of Judgments, § 24(1). In determining what constitutes a "transaction," the Restatement approach "giv[es] weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.*, § 24(2). Applying this "transactional" analysis to the particular facts of this case, the Court of Appeals concluded that Petitioner's antitrust lawsuit, the third lawsuit he has brought arising out of the same series of transactions, was barred by *res judicata*. *Manego III*, *supra*, 773 F.2d at 7.[1]

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[1] Although the First Circuit Court of Appeals did not formally adopt the Restatement approach until the decision below, the Court had applied the test on several earlier occasions. *See, e.g., Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56, 58 (1985); *Isaac* v. *Schwartz*, 706 F.2d 15, 17 (1983). In fact, as the Court acknowledged in *Manego III*, *supra*, 773 F.2d at 5, it appeared to have adopted the Restatement test *sub silentio* on these earlier occasions.

A. *There is No Conflict Among the Federal Courts Regarding the Restatement Approach to Res Judicata.*

The First Circuit's decision adopting the Restatement test does not conflict with any precedent of this Court or other Courts of Appeals. Courts and commentators alike have recognized the increasing acceptance of the Restatement as the test to employ in *res judicata* analysis. *See, e.g., Marrapese* v. *State of Rhode Island,* 749 F.2d 934, 936 (1st Cir. 1984), *cert. denied,* 106 S.Ct. 252 (1985); *Hagee* v. *City of Evanston,* 729 F.2d 510 (7th Cir. 1984); *Nilsen* v. *City of Moss,* 701 F.2d 556, 560 n.4 (5th Cir. 1983); 18 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 4407 at 55-56 (2d ed. 1983); 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.410[1] at 359-360 (2d ed. 1984). This Court itself has recognized that the Restatement approach is "more pragmatic" than earlier attempts to define a "claim" or "cause of action." *Nevada* v. *United States,* 463 U.S. 110, 130-131 n.12 (1983).

An examination of the case law indicates that, contrary to Petitioner's claim, there is no conflict among the federal circuit courts regarding this test. Most of the circuit courts have used or approved the Restatement test. Those few circuit courts which have not yet adopted the test have neither criticized the Restatement approach nor found it unusable.

The Restatement test has been approved and applied by eight of the federal circuit courts. In addition to the First Circuit, the Courts of Appeals in the following circuits have all explicitly adopted the approach stated in § 24 of the Restatement (Second) of Judgments: the Second Circuit in *NLRB* v. *United Technologies Corp.,* 706 F.2d 1254, 1260 (1983); the Fourth Circuit in *Adkins* v. *Allstate Insurance Co.,* 729 F.2d 974, 976 (1984); the Fifth Circuit in *Southmark Properties* v. *Charles House Corp.,* 742 F.2d 862, 870 (1984); the Sixth

Circuit in *Silcox* v. *United Trucking Service, Inc.*, 687 F.2d 848, 852 (1982); the Eighth Circuit in *Poe* v. *John Deere Co.*, 695 F.2d 1103, 1106 (1982); the Ninth Circuit in *Sidney* v. *Zah*, 718 F.2d 1453, 1459 (1983); and the Federal Circuit in *Young Engineers, Inc.* v. *U.S. International Trade Commission*, 721 F.2d 1305, 1314 (1983).[2] In addition, the Seventh Circuit has applied the Restatement approach to determine the *res judicata* effect of a state court judgment when that approach was dictated by the relevant state law. *Patzer* v. *Board of Regents*, 763 F.2d 851, 855 (1985) (Wisconsin law); *Hagee* v. *City of Evanston, supra*, 729 F.2d at 513 (Illinois law). In *Hagee*, the Seventh Circuit noted that the Restatement approach represents the "present trend among courts nationwide." *Id.*, at 513 n.5.[3]

Other circuit courts which have not explicitly cited the Restatement have employed an equivalent transactional analysis in resolving *res judicata* questions. The Eleventh Circuit has stated that it considers whether the two claims "involved a series of connected transactions. . . ." *First Alabama Bank* v. *Parsons Steel, Inc.*, 747 F.2d 1367, 1374 (1984), *rev'd on other grounds*, 54 U.S.L.W. 4144 (1986). Similarly, the Dis-

[2] Contrary to Petitioner's contentions in his Petition, the most current statements of the law in the Fourth, Sixth and Ninth Circuits have applied the Restatement test.

[3] In addition to the federal circuit courts, the Restatement test has been adopted by a number of states including: Delaware, in *Maldonado* v. *Flynn*, 417 A.2d 378, 381-382 (Del. Ch. 1980); Idaho, in *Houser* v. *Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 446, 649 P.2d 1197, 1202 (1982); Kentucky, in *Kirchner* v. *Riherd*, No. 84-SC-127-DG (Supreme Court, November 21, 1985); Maine, in *Beegan* v. *Schmidt*, 451 A.2d 642, 645 (Me. 1982); Massachusetts, in *Fluhr* v. *Allstate Insurance Co.*, 15 Mass. App. Ct. 983, 984, 447 N.E.2d 1254, 1255 (1983); Michigan, in *Gose* v. *Monroe Auto Equipment Co.*, 409 Mich. 147, 163, 294 N.W.2d 165, 169 (1980); Missouri, in *Dreckshage* v. *Community Federal Savings & Loan Assn.*, 641 S.W.2d 831, 833-834 (Mo. App. 1982); New Mexico, in *Three Rivers Land Co.* v. *Maddoux*, 98 N.M. 690, 695, 652 P.2d 240, 245 (1982); Oregon, in *Rennie* v. *Freeway Transport*, 294 Or. 319, 324, 656 P.2d 919, 921-922 (1982); and Wisconsin, in *DePratt* v. *West Bend Mutual Insurance Co.*, 113 Wis.2d 306, 311-312, 334 N.W.2d 883, 885-886 (1983).

trict of Columbia Circuit will look to the "facts surrounding the transaction or occurrence" to determine whether two actions arise from the same claim. *Page* v. *United States*, 729 F.2d 818, 820 (1984). The Third Circuit in *United States* v. *Athlone Industries, Inc.*, 746 F.2d 977, 984 (1984), has committed itself to a "broad view" of what constitutes a claim, and has stated that "[w]e are thus in keeping with '[t]he present trend . . . in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence' [citation omitted]." These three cases, all of which were cited by Petitioner to demonstrate a supposed conflict over adoption of the Restatement approach, in fact demonstrate the widespread acceptance of the pragmatic transactional analysis embodied in the Restatement.

Review of the case law thus demonstrates that the circuit courts, with the exception of the Tenth circuit, which has not yet had occasion to discuss the Restatement test, have been unanimous in using or approving the Restatement test. No circuit court has disapproved or rejected that test. There is, therefore, no conflict requiring this Court to grant certiorari in this case.

B. *Even If a Different Test Were Applied to Analyze the Res Judicata Question, Petitioner's Claim Would be Barred.*

Even if the First Circuit Court of Appeals in this case had employed the other test occasionally used for *res judicata* analysis, it would still have reached the conclusion that Petitioner's antitrust claim was barred. As in *Nevada* v. *United States, supra*, 463 U.S. at 131, it is "unnecessary . . . to parse any minute differences which these different tests might produce," because application of either test leads to a conclusion that the Petitioner's claim is barred.

In *Nevada* v. *United States*, this Court compared the complaints in both actions to determine whether the claims were similar and whether the litigants had the opportunity to raise the later claim in the first action. *Id.*, at 131-134. This Court noted that this approach was consistent both with the older "same evidence" test and the current transactional approach to *res judicata* questions. *Id.*, at 131 and n.12. In his *Manego III* antitrust conspiracy complaint, Petitioner has made claims about the Bank's and Willard's conduct identical to those in his earlier *Manego II* civil rights conspiracy complaint. Petitioner's basic claim in both *Manego II* and *Manego III* is that he has been injured because the Bank's and Willard's conduct caused the Selectmen to deny his applications for licenses to run a discotheque. As the *Manego III* District Court noted, the facts alleged in his antitrust complaint are "strikingly similar" to those in the civil rights complaint. *Manego III*, *supra*, 598 F.Supp. at 235. The Court of Appeals also noted that the conspiratorial "conduct alleged is precisely the same" in both complaints. *Manego III*, *supra*, 773 F.2d at 7. Only Petitioner's legal theory has changed. Petitioner plainly had the opportunity to provide both conspiracy labels, antitrust and civil rights, in his earlier *Manego II* complaint. Applying the analysis discussed by this Court in *Nevada* v. *United States*, *supra*, 463 U.S. at 130-134, it is clear that Petitioner's *Manego III* antitrust conspiracy action rests on the same evidence as his earlier *Manego II* civil rights conspiracy action, and would therefore still be barred by *res judicata*.

C. *A Review of the Decision Below by This Court Would Turn Simply on Application of Res Judicata Principles to the Unique Set of Facts Presented by This Case.*

If this Court were to grant certiorari, it would be asked to do little more than to apply a widely-accepted principle of law

to a particular set of facts. Whatever definition of "claim" this Court might use, the *res judicata* analysis would involve a review of the allegations, evidence, and underlying facts of Petitioner's various lawsuits. This work has already been done by the District Court and the Court of Appeals below, both of which concluded that the antitrust conspiracy cause of action was barred. The purpose of certiorari is not to "review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Such a review of evidence is particularly unnecessary in this case because Petitioner's proffered evidence has repeatedly been deemed inadequate to defeat motions for summary judgment. In *Manego II*, the District Court concluded that "[m]aking every inference favorable to the [Petitioner] one still is forced to conclude that the [Petitioner] has failed to set forth even the promise of evidence that would show involvement by any of these defendants in a conspiracy, sufficiently to create a genuine issue for trial." *Manego II*, *supra*, slip op. at 4. This decision was affirmed by the Court of Appeals which concluded that Petitioner's conspiracy allegations were "not enough to force the defendants to a trial to prove that their actions were not discriminatory." *Manego II*, *supra*, 692 F.2d at 177. Similarly, in *Manego III*, the District Court ruled that Petitioner's conspiracy allegations against the Board of Trade were without sufficient evidentiary support to withstand summary judgment. *Manego III*, *supra*, 598 F.Supp. at 240. Again, this ruling was affirmed. *Manego III*, *supra*, 773 F.2d at 7.

This Court has repeatedly and consistently recognized the importance of *res judicata* as a means of establishing "finality" in litigation. *See*, *e.g.*, *Nevada* v. *United States*, *supra*, 463 U.S. at 129; *Federal Department Stores Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). This Petition represents only the latest of a long series of efforts by a litigant unwilling to accept the final and binding resolution of his claim. Denial of the Petition

will vindicate the principles which "ensure[ ] the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Nevada* v. *United States*, *supra*, 463 U.S. at 129, *quoting Southern Pacific Railway Co.* v. *United States*, 168 U.S. 1, 49 (1897).

II. Certiorari Should be Denied Because the Result Reached in the Decision Below Can be Sustained on the Alternate Ground that Petitioner's Antitrust Claim is Barred by the Principles of the *Noerr-Pennington* Doctrine.

This Court should not grant certiorari to review the First Circuit Court of Appeals' dismissal of the complaint against the Bank and Willard, even if this Court were to disagree with the Court of Appeals on the *res judicata* issue. The decision below should be sustained on the alternate ground that Petitioner has failed to allege sufficient evidence to maintain his antitrust conspiracy claim. Because the action against the Bank and Willard was barred by *res judicata*, neither the District Court nor the Court of Appeals below addressed Petitioner's claim as to the Bank and Willard on the merits. However, both Courts did consider the merits of Petitioner's claim against the Orleans Board of Trade, and both concluded that the activities alleged by Petitioner were protected under the *Noerr-Pennington* doctrine. Because the antitrust conspiracy allegations against the Bank and Willard are substantially the same as those against the Orleans Board of Trade, the analysis performed by the Courts below justifies the dismissal of the antitrust conspiracy claim against the Bank and Willard as well.

In seeking certiorari on the ground that the Courts below erred in their analysis of the antitrust conspiracy claim, Petitioner does not allege that there is a conflict among the Circuits or that the First Circuit Court of Appeals failed to apply the prevailing legal standard. The *Noerr-Pennington* line of precedent clearly establishes the controlling principle that parties attempting to influence government agencies on issues of financial interest to them are immune from antitrust liability. *Pennington, supra,* 381 U.S. at 670; *Noerr Motor Freight, supra,* 365 U.S. at 139. The few exceptions to that principle, such as the "sham" exception enunciated in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 512 (1972), are similarly clear and well-defined.

Petitioner asks only that this Court itself review the record and apply accepted legal doctrine to the particular facts of this case. That analysis, however, is properly done by a District Court in ruling on a motion for summary judgment. In fact, here the District Court in its opinion below thoroughly canvassed the facts and concluded that there was nothing to "show or to raise an inference that the Board of Trade engaged in anything other than protected petitioning before the Board of Selectmen." *Manego III, supra,* 598 F.Supp. at 239. Petitioner's conspiracy claim rests only on the fact that two Selectmen, who were also members of the Orleans Board of Trade, may have voted at a Board of Trade meeting in opposition to Petitioner's license applications. This does not constitute evidence of a conspiracy between the Board of Trade and the Selectmen. Nor does it provide any evidence of a conspiracy involving the Bank or Willard.

This case does not present a situation which demands clarification or alteration of the established *Noerr-Pennington* doctrine. Moreover, Petitioner has not pointed to any facts which would make the application of the legal principles in this case of interest to anyone but the particular litigants involved. Ac-

cordingly, there is no need for this Court to grant certiorari to hear this case.

Conclusion.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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